No. 6

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In the Supreme Court of the United States

OCTOBER TERM, 1950 51

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS, E. WALSH

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Solicitor General, on behalf of the Secretary of Agriculture of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on November 9, 1950.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 470) is not reported. The opinion of the District Court is reported in 82 F. Supp. 614.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 9, 1950 (R. 488). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

1. Whether the Agricultural Marketing Agreement Act of 1937 confers on the Secretary of Agriculture latitude to provide in the Boston milk order for payments, out of the producer-settlement fund, to cooperative associations of producers for the performance of market-wide services found by the Secretary to be necessary since 1941 in order to make effective the classification, pricing, and pooling provisions in the milk order?

2. Whether as a matter of law the provisions in the Boston milk order for payments to cooperative associations of producers for the performance of market-wide services are "inconsistent" with the provisions in § 8c(5) of the Agricultural Marketing Agreement Act of 1937 relating to a uniform price for milk?

3. Whether the authorization in the Agricultural Marketing Agreement Act of 1937 for "necessary" and "incidental" provisions in a milk order imposes such a harsh requirement that these provisions included in the order, on the basis of evidence adduced at a public hearing, and conceded by the reviewing court to be bene-

ficial, helpful, and pronounced aids to all participants in the program since 1941, are nonetheless as a matter of law not necessary?

4. Whether the provisions of a milk order may be held invalid as not being "necessary" and "incidental" when the record before the reviewing court does not include the extensive hearing record on which the Secretary based his findings and issued the regulatory provisions.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The pertinent statutory provisions are in Appendix A, *infra*, pp. 24–29.

The order involved is the order regulating the handling of milk in the Boston marketing area (7 CFR 1947 Supp. 904.1 *et seq.*). The relevant findings and the pertinent provisions of the order are in Appendix B, *infra*, pp. 30–40.

STATEMENT

This action was instituted as a class action by five dairy farmers to enjoin the Secretary of Agriculture from making certain payments to cooperative associations of producers pursuant to the Boston milk order. The complaint alleges (R. 1–7) that there is no statutory authorization

for the provisions in the Boston milk order providing for payments to the cooperative associations of producers which perform services for the market as a whole and that such provisions in the order are, therefore, "without legal authority, and are unlawful and void." The suit was originally dismissed by the District Court on the ground that the Act vests no legal cause of action in milk producers, as distinguished from milk handlers who are regulated by the order, and its judgment was affirmed by the United States Court of Appeals for the District of Columbia. *Stark* v. *Wickard,* 136 F. 2d 786. That decision, however, was reversed in *Stark* v. *Wickard,* 321 U. S. 288, where the Court held that the dairy farmers had legal standing to sue. The District Court was directed, in the remanding of the case, to consider "the soundness of the allegations made by the petitioners in their complaint" and "whether the statutory authority given the Secretary is a valid answer to the petitioners' contention."

On remand, the case was heard on a record consisting of the transcript of the proceedings before the Secretary of Agriculture preceding the issuance of the 1941 amendments to the Boston milk order,[1] and affidavits which had been submitted in connection with a prior motion for

[1] The provision for payments to cooperatives was first added to the Boston order by the 1941 amendments.

summary judgment.[2] Although the Secretary amended the cooperative payment provisions in 1947, after an extensive hearing held in 1946 at which the entire subject was fully considered, the transcript of the 1946 hearing was not offered in evidence. The pertinent facts which justify the provisions for payments to cooperatives are summarized at pages 11–12, *infra*.

The District Court held that the statute does not depute authority to the Secretary to include in a milk order provisions for payments for market-wide services rendered by cooperative associations of producers, and the District Court enjoined the Secretary from making further payments under the Boston milk order (R. 154–5). The effectiveness of the judgment was stayed by the District Court on condition that all such payments be held in escrow pending the final disposition of the case on appeal (R. 156–7), and the cooperatives who qualify for payments are continuing to perform the services. The judgment of the District Court was affirmed by the United States Court of Appeals for the District of Columbia Circuit, with Judge Edgerton dissenting (R. 470).

REASONS FOR GRANTING THE WRIT

This case involves important problems in the administration of the Agricultural Marketing

[2] The summary judgment had been denied by Judge Letts (R. 132).

Agreement Act of 1937. The provisions in the Boston milk order for payments to cooperatives for the performance of market-wide services were nullified by the decision of the court below, and the basis of the decision brings into question the provisions for cooperative payments in the milk orders for the New York metropolitan marketing area (7 CFR 927.1 *et seq.*), the Cincinnati marketing area (7 CFR 965.2 *et seq.*), and the Dayton-Springfield marketing area (7 CFR 971.1 *et seq.*). The importance of the immediate problem is indicated to some extent by the fact that approximately $14,000,000 has been paid since 1938 to the cooperative associations for the performance of market-wide services.[3] In addition, the opinion of the lower court, in holding that the only deductions that may be made in computing the uniform blended price are those "adjustments" or deductions itemized in § 8c (5) of the Act, creates a serious question relative to the numerous

[3] The cooperative payments under the New York order since September 1, 1938, total approximately $12,000,000. See the New York Market Administrator's Bulletin, Vol. 7, No. 5, p. 3; Vol. 8, No. 3, p. 13; Vol. 10, No. 3, pp. 13 and 24; and subsequent issues in Vol. 10, *viz*, No. 4, p. 8; No. 5, p. 8; No. 6, p. 8; No. 7, p. 8; No. 8, p. 8; No. 9, p. 8; and No. 10, p. 8. The cooperative payments under the Boston marketing order total approximately $1,500,000 (R. 133), and the payments in escrow under the order of the District Court total approximately $300,000. The cooperative payments under the Cincinnati order total approximately $235,000, and under the order for the Dayton-Springfield marketing area the payments total approximately $30,000.

other deductions or "adjustments" in various milk orders, based on the "incidental * * * and necessary" authorization in § 8c (7) of the Act.

The sections of the statute which give rise to the present problem are Sections 8c (5) and (7) of the Agricultural Marketing Agreement Act. Section 8c (5) provides that milk marketing orders "shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others." The following enumerated conditions relate to the establishment of the equalization pool system, including uniform prices to producers, with which this Court is familiar.[4] Section 8c (5) also provides that the minimum uniform prices to be paid by milk handlers to producers for milk shall be "subject only to adjustments" for specified purposes. But this, of course, is subject to the exception for provisions authorized by Section 8c (7). Section 8c (7), referred to in Section 8c (5), provides that the marketing orders "shall contain" one or more of the provisions therein set forth, including provisions that are

> incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

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[4] See, in particular, *United States* v. *Rock Royal Co-op., Inc.*, 307 U. S. 533.

The Secretary found, on the basis of evidence adduced at a public hearing, that the provisions in the milk order for payments to cooperatives for the performance of market-wide services are "incidental to" and "necessary" to effectuate the other provisions of the order for the classification, pricing, and pooling of milk, and that such provisions for cooperative payments are "not inconsistent with" the other provisions of the order under Section 8c (5) of the Act. The court below disagreed with the Secretary's determination on the grounds that (1) the provisions for payments to cooperatives are not "incidental" and are not "necessary," and (2) the provisions are "inconsistent with" the provisions of § 8c (5) of the Act.

The provisions in the Act and the challenged provisions in the order apply to an industry that "is affected by factors of instability peculiar to itself which call for special methods of control." *Nebbia* v. *New York,* 291 U. S. 502, 517. Whether particular provisions in a milk order are necessary or incidental or inconsistent with other provisions of the order or statute depend in large part upon an examination of the evidence upon which the Secretary's findings are predicated. The Boston milk order was amended in 1941, on the basis of a public hearing, to provide for the payments to cooperatives for services performed, and the transcript of that hearing is included in the record in this case. But the

present payment provisions in the order were made effective by way of amendment on August 1, 1947, and the hearing record on which the 1947 amendments are based is not included in the record in this case. The lower court's reference to these amendments in 1947 as involving only "slight procedural changes" is refuted by the notice of hearing (11 F. R. 640, 643–644) on which the 1947 amendments are based. Although some of the proposals deal with changes in the rates of payment, one would have deleted all of the provisions of the order for payments to cooperatives, and another proposal was to reconsider, in all respects, "the basis for the payments as well as the need for such payments and their effectiveness." The evidence adduced at the hearing with respect to these issues is found in 472 pages of testimony and 33 exhibits.[5] In the absence of the evidence on which the findings and order are based, the courts must assume the existence of sufficient evidence to support the action by the Secretary. *Niagara Hudson Power Corp.* v. *Leventritt,* Nos. 211 and 212, this Term, decided January 15, 1951, p. 4 of slip opinion; *United States* v. *Rock Royal Cooperative, Inc.,* 307 U. S. 533, 567–568; *Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177; *Thomp-*

[5] The transcript of the record of this hearing is a public record in the Office of the Hearing Clerk, United States Department of Agriculture, Washington, D. C., identified as Docket No. AO–14–A12, and the evidence with respect to co-operative payments is found in pages 1621–2093.

son v. *Consolidated Gas Utilities Corporation*, 300 U. S. 55, 69. Indeed, it does not appear that the court below seriously challenged the Secretary's findings on the facts, inasmuch as the Court stated (R. 484) that:

> There is no doubt that these services are pronounced aids to all participants in the marketing area—producers, handlers and consumers. This is so clear that it serves no purpose to describe the helpful effects in detail.

The issue which the court below faced, therefore, was whether, assuming the existence of facts which supported the Secretary's findings, his conclusion was invalid as a matter of law.

It must be apparent that in the resolution of this type of problem, with its determination of necessity, *inter alia*, the division of the issues into separate factual and legal ingredients is a difficult process, inasmuch as the matter is one as to which administrative discretion must be exercised in the light both of the facts and the law. Nevertheless, the court below held, as a matter of law, that payments to cooperatives were improper, and the reasoning advanced in its opinion would apply to many other types of deductions also.

Although the case cannot be said to raise any issue of fact, an understanding of the legal issues nevertheless requires reference to the nature of the milk industry and to the reasons for the payments to cooperatives. Some of these facts are

well known to the Court, and others appear from the transcript of the 1941 hearing, which is included in the present record.

The central problem of the milk industry is the annual surplus of milk in the spring and summer months, coupled with an annual shortage of milk in the late fall and winter months. The demand for fluid milk is fairly constant over the year, so that the spring and summer surplus cannot be avoided by the competitive elimination of producers (as in most industries) without resulting in inadequate milk supplies during the winter. *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, 549–550; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 593. If producers cannot sell their spring and summer surplus, they may be forced either to dump the milk or to reduce their herds to a size which will not produce a surplus in the flush season—which will mean that they will produce an insufficient supply during the winter months.

Indeed, the Boston market has not been able, in recent years, to obtain enough milk from its milkshed to meet the market demands for fluid milk during the fall and winter months, although on "an annual basis, even in recent years, the supply from the Boston milkshed has greatly exceeded the requirements for fluid milk."[6] Co-

[6] *Seasonality of Deliveries in the Boston Milkshed* (United States Department of Agriculture, Bureau of Agricultural Economics, June 1949), p. 2.

operatives that control all of the milk of their producer members and actively provide or find outlets for milk on the Class I market, i. e., the higher pri d market, thereby contribute to a milk pool that has a higher blended price than would otherwise be the case. By providing an outlet in their own manufacturing plants or elsewhere, or finding an outlet, for surplus milk—which otherwise would be dumped—the cooperatives contribute to the development of a milkshed that will produce an adequate supply of milk in the period of short production. All producers are benefited by the services performed by these cooperatives with respect to surplus milk, and all producers are benefited by the various other services whereby these cooperatives advance the interest of the producers in general. Under the Boston order, the payments are made only to the cooperatives who are qualified to receive them, and each application is submitted to the Secretary for his determination as to qualification (Section 904.10). The Secretary may require the submission of reports as to the use of cooperative payments, and may suspend the payments whenever there is "reason to believe" that the cooperative is no longer entitled to them (*ibid*).

In the light of hese facts, we now turn to the questions of law raised by the decision below.

1. The court below first held that the provisions for cooperative payments were "inconsistent with" the provisions of Section 8c (5) (B), which

permits only specified adjustments in the uniform price. But it is to be noted that the adjustments referred to in Section 8c (5) (B) are variations in the uniform price paid to producers for milk. Since the deduction for payments to cooperatives, for services performed, is taken out of the equalization pool before the uniform price to be paid to producers is determined, it does not prevent the farmers from being paid at a uniform rate for their milk. The payment for services rendered to producers in the milkshed generally, prior to the computation of the uniform price, obviously does not constitute a departure from uniformity such as may be limited by Section 8c (5) (B). Furthermore, the only requirement of uniformity in Section 8c (5) of the Act relates to a uniform price to "producers" "for milk." The lower court failed to distinguish between payments *for services* and payments "for milk," and between payments to a cooperative corporation, which is, of course, a separate entity, and payments to the producer members.

The court below seems to have been of the view that there was a departure from uniformity in the price received by producers because the payments to the cooperatives would result in higher prices for milk to their members than to nonmembers. But it cannot be assumed that the cooperative rendering these services, of value to members and nonmembers alike, incurred no expense in doing so. In the absence of evidence of

record to that effect it cannot be assumed that the payments resulted in profits to the members of the cooperative. Moreover, the payments are not to the cooperatives' members, but to the corporate entities, as reimbursement, in part at least, for expenses incurred in the performance of market-wide services. The holding of the court below that the payment to a cooperative association is a payment to the producer members is therefore not only erroneous as a matter of law (*Farmers Union Co-operative Co.* v. *Commissioner,* 90 F. 2d 488, 491 (C. A. 8)), but, as has been indicated, equally unsupported by this record, insofar as the payments here involved are concerned.

The theory of the decision below apparently is that all deductions or "adjustments" not specificially authorized by Section 8c (5) are inconsistent with that section and therefore not allowable under Section 8c (7). But assuming that payment to cooperatives is an adjustment in the uniform price, the challenged provisions in the order are necessary "equitably to apportion" the total value of milk among all producers, and these provisions are, therefore, valid on the basis of subsection (B) of Section 8c (5).

Moreover, the holding of the court below with respect to the meaning of the "inconsistent" limitation in Section 8c (7) would affect many other types of deductions found in various milk orders, all of which are necessary to the fair and effec-

tive operation of the marketing order program. Thus, the original milk order for the New York Metropolitan marketing area [7] provided from 1938 to 1942 for payments to handlers, not merely cooperatives, for performing market-wide services. These payments, which in total amounted to approximately $13,000,000,[8] and were for the purpose of compensating handlers for diverting surplus milk from fluid milk plants to manufacturing plants, were subtracted in the computation of the uniform blended price and deducted in exactly the same way as the present deduction for payments to cooperatives for performing similar services for the market as a whole. The deduction for diversion payments to handlers was described and applied in *Grandview Dairy* v. *Jones,* 157 F. 2d 5 (C. A. 2), certiorari denied, 329 U. S. 787.

The decision below is inconsistent in reasoning with *Green Valley Creamery* v. *United States,* 108 F. 2d 342, 345 (C. A. 1), in which it was held that the Act "does not specify the detailed method by which a blended or uniform price is to be computed," and that a deduction or subtraction in computing the uniform blended price is legal if "reasonably adapted to promoting the successful operation of the equalization pool." The adjustment that was held valid in the *Green Valley*

[7] 7 C. F. R. 1938 Supp. 927.8 (f).

[8] See the New York Market Administrators Bulletin, Vol. 3, No. 7, pp. 8–9.

Creamery case was one not specifically authorized by Section 8c (5).

Another type of deduction not specifically authorized by Section 8c (5) is that contained in Section 904.8 (b) (7) of the Boston order for a deduction of 4 to 5 cents per cwt. "for the purpose of retaining a cash balance" in the equalization fund. The purpose of this is to insure the solvency of the monthly pool. In the absence of a cash reserve, the failure of any handler to make full payment to the Market Administrator would result in the insolvency of the equalization or producer-settlement fund. In that situation, the Market Administrator could not make full payment out of the fund, and the failure of a handler to receive full payment due from the fund would be regarded as relieving him from the obligation to pay producers at the uniform blended price. If, on the contrary, the handler should be required to pay the uniform blended price without having received full payment from the equalization or producer-settlement fund, the handler would pay for his milk at a rate above the uniform class price set forth in the order. This would destroy uniformity in prices under § 8c (5) (A) of the Act. In addition, if the handler maintained uniformity with respect to the class price under § 8c (5) (A) of the Act, it could be done only by paying his producers less than the uniform blended price and thereby destroying uniformity under § 8c (5) (B) of the Act. In

order to obviate this result, all of the many milk orders for marketwide pools contain provisions for the establishment of a cash reserve, even though such a deduction is not expressly authorized by § 8c (5).

Some of the milk orders also provide for deductions from the producer-settlement fund for seasonality payments, which are designed to compensate for additional services or expenses incident to the production of more milk in the periods of short supply.[9] The deduction for seasonality payments is not in the list of adjustments or deductions enumerated in § 8c (5), and, like the cooperative payments here involved, is based on the "incidental * * * and necessary" provision in § 8c (7) of the statute.

The rationale of the holding of the lower court brings into question all other deductions, additions, or "adjustments"—not enumerated in § 8c (5) of the Act—that have been made for many years in order to regulate effectively with respect to the mutable marketing problems in milk marketing areas. The doctrine of repugnancy as set forth in the lower court's opinion manifestly contravenes the statutory purpose to vest in the Secretary wide latitude to regulate with respect to the fluctuating conditions in milk marketing.

[9] See e. g., the Louisville milk order (7 C. F. R. 946.7 (b) (3). This deduction from the amounts available to producers during the flush season is used to encourage production during the slack season.

2. The court below also held that the payments to cooperatives were not authorized under the "incidental" and "necessary" requirement of Section 8c (7). Since the court conceded that the services for which the payments were made were beneficial to the milkshed as a whole, and equitable (R. 484), the effect of its decision is narrowly to circumscribe the Secretary's authority. Clearly, however, the words "incidental" and "necessary" were meant to vest broad discretionary authority in the Secretary, which was to be exercised in the light of factual considerations. The court observed in *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969, 977 (C. A. 2), that the "background and legislative history of this legislation leave no doubt that Congress gave the Secretary broad discretion in its administration." The Congress could not foresee every contingency in this field in which "the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult."[10] The Secretary is authorized by the Act to include provisions "auxiliary to those definitely specified" in Section 8c (5) of the Act. *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 575–576. The "terms of the [milk] Order are largely matters of administrative discretion." *Stark* v. *Wickard*, 321 U. S. 288, 310. The provisions in Section 8c (5) of the Act are not requirements of "literalness or consumptive ultimacy" but should

[10] *Hood & Sons* v. *DuMond*, 336 U. S. 525, 529.

be given such meaning as will not defeat the regulatory purpose of the Act. *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 94 (C. A. 8), certiorari denied, 329 U. S. 788. And the decision in the *Green Valley* case, discussed, *supra,* p. 15, sustaining a deduction as "reasonably adapted to promoting the successful operation of the equalization pool" manifests a less restrictive interpretation of "incidental" and "necessary" authorization than was permitted by the court below.

The holding below that payments for services that are beneficial and helpful to the market as a whole would not comply with the "harsh" standard of necessity would seem to be in conflict with decisions of this Court construing the word "necessary," when used in other connections, as not meaning indispensable or essential or vital. *Armour & Co.* v. *Wantock,* 323 U. S. 126, 129–132 states that the "word 'necessary' * * * has always been recognized as a word to be harmonized with its context"; that "all depends upon the detail with which that bare phrase is clothed"; and that "what is practically necessary * * * will depend on its environment and position." See also, *M'Culloch* v. *Maryland,* 4 Wheat. 316, 413, 414; *Gemsco, Inc.* v. *Walling,* 324 U. S. 244. The dissenting opinion of Judge Edgerton below (R. 487) correctly states the well-established principle relative to the word "necessary."

The Secretary has included in milk orders many provisions designed to aid in the solution of the

surplus milk problem[11] which are based on the "incidental * * * and necessary" authorization in the Act. This has been necessary because, *inter alia,* the price under a milk order has no relevancy or application to surplus milk for which a producer can find no market. The order is applicable only to milk that handlers are willing to accept from producers. Moreover, the blended price is a lower price or a higher price, depending on the market-wide utilization of the milk by the handlers, *i. e.,* whether it is utilized on the fluid milk market at the Class I price or on the manufacturing market at the Class II price. These facts are such that to attain the economic objective of the Act—*i. e.,* to insure, in the public interest, an adequate supply of pure and wholesome milk—auxiliary provisions must be adopted whereby the highest possible utilization may be had for the surplus milk.

Also, in fixing the class prices authorized by Section 8c (5) of the Act, consideration must be given to the possibilities for disposition of surplus milk. The class prices are determined, at least to some extent, by the prospective returns

[11] See, *e. g.,* the New York order (7 CFR, § 927.9 (h)) wherein provision is made for compensatory payments to be added, as an "adjustment," in computing the uniform blended price. The compensatory payments relate to milk that is not produced by the dairy farmers who regularly supply the marketing area. This adjustment is not enumerated in § 8c (5) of the Act, but it is incidental and necessary in some marketing areas.

from surplus milk. If the surplus milk is to be dumped for lack of any outlet, the prices under the order may be substantially different from the prices in the event of an outlet for the surplus milk. To hold that the provisions in the order encouraging and providing an avenue for the disposition of surplus milk to the best advantage of all producers in the market, are not auxiliary to the fixing of class prices is to fail to recognize compelling and irrefutable facts.

The view expressed in the majority opinion in the lower court, as to the meaning of "necessary," is of serious concern to the Secretary in the administration of all milk orders. The statute provides in § 8c (18) that the prices in milk orders shall be amended from time to time as the Secretary finds "necessary" on account of changed circumstances. If "necessary" implies, as a matter of law, a severe, unduly rigorous, or harsh requirement of proof, that requirement would apply to all of the many provisions in milk orders that are based on a "necessary" authorization in the Act; and these provisions in the orders are too numerous for summarization in brief compass.

There is nothing in the statute's background, text, or purposes to indicate that the terms "incidental," "necessary," and "inconsistent" are to be regarded as words of art having, as a matter of law, definite and circumscribed meanings so that their application is to be determined irre-

spective of the facts. The statutory provisions are to be applied in the light of the mischief to be corrected and the economic goal to be attained, and a regulatory provision found by the Secretary, on the basis of a hearing record, to be within the statutory authorization is to be tested by whether the finding has substantial warrant in the evidence and a reasonable basis in law. *Unemployment Commission* v. *Aragon*, 329 U. S. 143, 153–154; *Securities and Exchange Commission* v. *Central-Illinois Corp.*, 338 U. S. 96, 126. Certainly this should be the criterion with regard to regulatory provisions for payments to, and services by, cooperatives. The Secretary is required by the Act to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution."[12] This declaration of Congressional policy with respect to cooperatives forecloses any argument that the "incidental * * * and necessary" authorization in

[12] Section 10 (b) (1) of the Act, 7 U. S. C. 610 (b) (1). It was made clear in *United States* v. *Rock Royal Cooperative*, 307 U. S. 533, 562, 565, that different treatment and special considerations have been accorded to marketing cooperatives by state and Congressional legislation alike, and that the "distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment."

the Act is to be given a cramping construction which precludes, as a matter of law, payments for market-wide services performed by cooperative associations of producers.

The opinion of the lower court overturned the Secretary's order not because of factors peculiar to this case, but as a result of pervasive constructions of statutory language applicable to many provisions of all of the other milk orders in effect throughout the country. The disruptive effect of the interpretations by the lower court is such that the Secretary believes that the administration of the Act in accordance with those interpretations will result in serious inequities, and that the objectives of the entire statutory plan will be impaired. These issues are of such public importance that they should be resolved by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

W CARROLL HUNTER,
Solicitor.

NEIL BROOKS,
Associate Solicitor,
U. S. Department of Agriculture.

FEBRUARY 1951.

APPENDIX A

The following are relevant sections of the Agricultural Market Agreement Act of 1937, 50 Stat. 246, amending the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended (7 U. S. C. 601 *et seq.*):

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

Notice and Hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and Issuance of Order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

Terms—Milk and Its Products

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) *Providing:*

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk

products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value

of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in

all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

Terms Common to all Orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

* * * * *

SEC. 10 (b) (1). * * * The Secretary, in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

APPENDIX B

The following are revelant findings (6 F. R. 3762 and 12 F. R. 4921) and sections of the Boston milk order, as amended (12 F. R. 4921, 7 CFR 904.1 *et seq.*):

The amended order effective August 1, 1941, contains the following findings of fact (6 F. R. 3762, 7 CFR 1941 Supp., 904.0):

> (a) The Secretary finds, upon the evidence introduced at the hearings, said findings being in addition to the findings made upon the evidence introduced at the original hearings on this part, and on amendments to said order, and being in addition to the other findings and determinations made prior to or at the time of the original issuance of said order, and of amendments thereto (which findings are hereby ratified and affirmed save only as such findings are in conflict with the findings hereinafter set forth): * * *
>
> (3) That the provisions relating to the payments out of the equalization pool to cooperative associations performing certain marketing services are incidental to, not inconsistent with, the other provisions of this part, as amended, and necessary to effectuate the other provisions of the order, as amended; * * *
>
> (6) That the issuance of this part, as amended, and all of its terms and conditions will tend to effectuate the declared policy of the act. * * *

The amended order effective August 1, 1947, contains the following findings of fact (12 F. R. 4921, 7 CFR 1947 Supp., 904—Appendix):

> (a) *Findings* * * * Upon the basis of the evidence introduced at such hearings and the record thereof, it was found that:
>
> (1) The said order, as amended and as hereby further amended, and all of the terms and conditions of said order, as amended and as hereby further amended, will tend to effectuate the declared policy of the act: * * *
>
> The foregoing findings are supplementary and in addition to the findings made in connection with the issuance of the aforesaid order and the findings made in connection with the issuance of each of the previously issued amendments thereto; and all of said previous findings are hereby ratified and affirmed except insofar as such findings may be in conflict with the findings set forth herein.

The following are the relevant sections of the Boston milk order, as amended (12 F. R. 4921, 7 CFR 1947 Supp., 904.8 and 904.10):

> § 904.8 *Minimum blended prices to producers*—(a) *Computation of value of milk received from producers.*—For each month, the market administrator shall compute the value of milk received from producers which is sold, distributed, or used by each pool handler, in the following manner:
>
> (1) Multiply the quantity of milk in each class by the price applicable pursuant to § 904.7 (a) and (b);
>
> (2) Add together the resulting value of each class; and

(3) Adjust the value determined in subparagraph (2) of this paragraph as provided in § 904.7 (d).

(b) *Computation of the basic blended price.*—The market administrator shall compute the basic blended price per hundredweight of milk delivered during each month in the following manner:

(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each pool handler from whom the market administrator has received at his office, prior to the 11th day after the end of such month, the report for such month and the payments required pursuant to § 904.9 (b) (2) and (g) for milk received during each month since the effective date of the most recent amendment of this part;

(2) Add the total amount of payments required from handlers pursuant to § 904.9 (g);

(3) Add the amount of unreserved cash on hand at the close of business on the 10th day after the end of the month from payments made to the market administrator by handlers pursuant to § 904.9;

(4) Deduct the amount of the plus differentials, and add the amount of the minus differentials, which are applicable pursuant to § 904.9 (e);

(5) Subtract the total amount of cooperative payments required by § 904.10 (b);

(6) Divide by the total quantity of milk for which a value is determined pursuant to subparagraph (1) of this paragraph; and

(7) Subtract not less than 4 cents nor more than 5 cents, for the purpose of retaining a cash balance in connection with

the payments set forth in § 904.9. This result shall be known as the basic blended price for milk containing 3.7 percent butterfat.

(c) *Announcement of blended prices.*—On the 12th day after the end of each month the market administrator shall mail to all pool handlers and shall publicly announce:

(1) Such of these computations as do not disclose information confidential pursuant to the act;

(2) The zone blended prices per hundredweight resulting from adjustment of the basic blended price by the differentials pursuant to § 904.9 (e); and

(3) The names of the pool handlers, designating those whose milk is not included in the computations.

§ 904.9 *Payments for milk*—(a) *Advance payments.*—On or before the 10th day after the end of each month, each pool handler shall make payment to producers for the approximate value of milk received during the first 15 days of such month. In no event shall such advance payment be at a rate less than the Class II price for such month. The provisions of this paragraph shall not apply to any handler who, on or before the 17th day after the end of the month, makes final payment as required by subparagraph (1) of paragraph (b) of this section.

(b) *Final payments.*—On or before the 25th day after the end of each month, each pool handler shall make payment for the total value of milk received during such month as required to be computed pursuant to § 904.8 (a), as follows:

(1) To each producer at not less than the basic blended price per hundredweight, subject to the differentials provided in paragraphs (d) and (e) of this section, for the quantity of milk delivered by such producer; and

(2) To producers, through the market administrator, by paying to, on or before the 23d day after the end of each month, or receiving from the market administrator, on or before the 25th day after the end of each month, as the case may be, the amount by which the payments required to be made pursuant to subparagraph (1) of this paragraph are less than or exceed the value of milk as required to be computed for such handler pursuant to § 904.8 (a), as shown in a statement rendered by the market administrator on or before the 20th day after the end of such month.

(c) *Adjustments of errors in payments.*— Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments pursuant to subparagraph (2) of paragraph (b) of this section, the market administrator shall promptly bill such handler for any unpaid amount and such handler shall, within 15 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is payable by the market administrator to any handler, the market administrator shall, within 15 days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of an amount less than is required by this section, the handler shall

make up such payment to the producer not later than the time of making final payment for the month in which such error is disclosed.

(d) *Butterfat differentidl.*—Each pool handler shall, in making the payments to each producer for milk received from him, add for each one-tenth of 1 percent of average butterfat content above 3.7 percent or deduct for each one-tenth of 1 percent of average butterfat content below 3.7 percent an amount per hundredweight which shall be calculated by the market administrator as follows: divide by 33.48 the weighted average price per 40-quart can of 40 percent bottling quality cream, f. o. b. Boston, as reported by the United States Department of Agriculture for the period between the 16th day of the preceding month and the 15th day inclusive of the month during which such milk is delivered, subtract 1.5 cents, and divide the result by 10: *Provided,* That if no such cream price is reported, multiply the average price reported for such period by the United States Department of Agriculture for U. S. Grade A (U. S. 92-score) butter at wholesale in the Chicago market by 1.4, subtract 1.5 cents, and divide the result by 10.

(e) *Location differentials.*—The payments to be made to producers by handlers pursuant to subparagraph (1) of paragraph (b) of this section shall be subject to the differentials set forth in Column B of the table in § 904.7 (c), and to further differentials as follows:

(1) With respect to milk delivered by a producer whose farm is located more than 40 miles but not more than 80 miles from the State House in Boston, there shall be

added 23 cents per hundredweight, unless such addition gives a result greater than the Class I price pursuant to § 904.7 (a) and (c) which is effective at the plant to which such milk is delivered, in which event there shall be added an amount which will give as a result such price.

(2) With respect to milk delivered by a producer whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight, unless such addition gives a result greater than the Class I price pursuant to § 904.7 (a) and (c) which is effective at the plant to which such milk is delivered, in which event there shall be added an amount which will give as a result such price.

(f) *Other differentials.*—In making the payments to producers set forth in subparagraph (1) of paragraph (b) of this section, pool handlers may make deductions as follows:

(1) With respect to milk delivered by producers to a city plant which is located outside the marketing area and more than 14 miles from the State House in Boston, 10 cents per hundredweight;

(2) With respect to milk delivered by producers to a country plant, at which plant the average daily receipts of milk from producers are:

(i) Less than 17,000 but greater than 8,500 pounds, 4 cents per hundredweight; and

(ii) 8,500 pounds or less, 8 cents per hundredweight.

* * * * * *

§ 904.10 *Payment to cooperative associations*—(a) *Application and qualification*

for cooperative payments.—Any cooperative association of producers duly organized under the laws of any state may apply to the Secretary for a determination that it is qualified to receive cooperative payments in accordance with the provisions of this section. Upon notice of the filing of such an application, the market administrator shall set aside for each month, from the funds provided by handlers' payments to the market administrator pursuant to § 904.9, such amount as he estimates is ample to make payment to the applicant, and hold it in reserve until the Secretary has ruled upon the application. The applicant association shall be considered to be a qualified association entitled to receive such payments from the date fixed by the Secretary, if he determines that it meets all of the following requirements.

(1) It conforms to the requirements relating to character of organization, voting, dividend payments, and dealing in products of nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

(3) It systematically checks the weights and tests of milk ~~which~~ its members deliver to plants not operated by the association.

(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

(6) It constantly maintains close working relationships with its members.

(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

(8) It is in compliance with all applicable provisions of this order.

(b) *Cooperative payments.*—On or before the 25th day after the end of each month, each qualified association shall be entitled to receive a cooperative payment from the funds provided by handlers' payments to the market administrator pursuant to § 904.9. The payment shall be made under the conditions and at the rates specified in this paragraph, and shall be subject to verification of the receipts and other items upon which such payment is based.

(1) Each qualified association shall be entitled to payment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to § 904.9 (b) (2) and § 904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (c) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to this subparagraph shall be at such lower rate.

(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association.

(c) *Reports relating to cooperative payments.*—Each qualified association shall, upon request by the market administrator, make reports to him with respect to its use of cooperative payments and its performance in meeting the requirements set forth as the basis for such payments, and shall file with him a copy of its balance sheet and operating statement at the close of each fiscal year.

(d) *Suspension of cooperative payments.*—Whenever there is reason to believe that an association is no longer meeting the qualification requirements, the market administrator shall, upon request by the Secretary, suspend cooperative payments to it, and shall give the association written notice of the suspension. Such suspended payments shall be held in reserve until the Secretary has, after notice and opportunity for a hearing, ruled upon the performance of the association.

(e) *Deductions from payments to members.*—(1) Each association which is entitled to receive cooperative payments on milk which its producer members deliver to a handler other than a qualified association may file a claim with the handler for amounts to be deducted from the handler's payments to such members. The claim shall contain a list of the producers, an agreement to indemnify the handler in the making of the deductions, and a certification that the association has an unterminated membership contract with

each producer, authorizing the claimed deduction.

(2) In making payments to his producers for milk received during the month, each handler shall make deductions in accordance with the association's claim, and shall pay the amount deducted to the association within 25 days after the end of the month.

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